BENTON C. CAVIN

IBLA 81-427 Decided October 5, 1984

Appeal from a decision of the California State Office, Bureau of Land Management, rejecting class 1 color-of-title application, approving class 2 color-of-title application, requiring payment of back taxes, and directing payment in the amount of $183,000. CA 3542.

Reversed and remanded.

1. Board of Land Appeals -- Delegation of Authority: Extent of

The Board of Land Appeals has been delegated full authority by the Secretary of the Interior to review decisions rendered by Departmental officials relating to the use and disposition of public lands. Where, on appeal to the Board, BLM admits the existence of errors and omissions in its decision, but declines to delineate the nature and effect of such errors and omissions, the Board may, in its discretion, determine de novo any factual or legal question necessary for the adjudication of the appeal.

2. Color or Claim of Title: Improvements

Where structures on land sought under a color-of-title application clearly enhance the value of the land for uses to which the land may properly be put, such structures constitute improvements of land within the meaning of a class 1 color-of-title claim.

3. Color or Claim of Title: Improvements

Where the evidence establishes that various structures were destroyed by agents of the Federal Government, the Government will not be heard to argue that such structures did not constitute improvements within the meaning of the Color of Title Act, absent a compelling showing that such structures did not enhance the value of the land at the time of their destruction.

4. Color or Claim of Title: Cultivation -- Color or Claim of Title: Improvements

The planting of seedlings and the thinning and pruning of coniferous trees are not acts of cultivation under the Color of Title Act but rather the placement of improvements on the land.

5. Appraisals

Inasmuch as the Uniform Appraisal Standards, developed by the Interagency Land Acquisition Conference, expressly cautions against cumulative appraisals of different estates in land where the entire fee is being acquired, an appraisal conducted in violation thereof is invalid, absent express justification for the deviation and a specific adjustment to avoid overvaluation of the total estate.

6. Appraisals -- Color or Claim of Title: Improvements

The appraised market value of a parcel of land sought under the Color of Title Act is properly adjusted to subtract the value of the applicant's improvements. The amount properly deducted, however, is not controlled by the applicant's expenditures, but rather is dependent upon the enhancement in value to the tract created by such improvements.

7. Color or Claim of Title: Generally -- Color or Claim of Title: Appraised Value

Under the Color of Title Act, each applicant's equities must be considered on their own merits. Among the factors properly considered are the length of an applicant's possession, the price paid and whether such price constituted fair market value, the degree of reasonableness of an applicant's belief that he or she held good title, the length of the chain of title, how the errors were caused, whether and to what extent taxes had been paid on the land, and any other factors which, in a spirit of fairness, a court of equity would recognize.

8. Color or Claim of Title: Generally -- Rights-of-Way: Generally

Upon the filing of a proper class 1 color-of-title application, the applicant's right to purchase the land described in the application vests. Subsequent to such filing, BLM lacks authority to diminish the estate applied for, and, therefore, may not grant a right-of-way to any party, including an agency of the Federal Government.

9. Color or Claim of Title: Generally -- Surveys of Public Lands: Generally

The extent of an applicant's color-of-title claim is necessarily limited to the land actually described in the conveyance from which the color-of-title originates, regardless of whether or not this description accurately describes all land occupied by the applicant.

APPEARANCES: Benton C. Cavin, pro se; Lynn M. Cox, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Benton C. Cavin has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated February 13, 1981, rejecting his class 1 color-of-title application, approving his class 2 color-of-title application, requiring the payment of back taxes, and determining the purchase price to be $183,000. We reverse.

In order to place the present appeal in proper perspective, it will be necessary to review the protracted history of appellant's dealings with the Department.

Appellant first filed his color-of-title application under the Color of Title Act, 43 U.S.C. § 1068 (1982), on February 17, 1976. 1/ In his application, appellant sought to purchase 40 acres of public land described as the NE 1/4 NE 1/4 sec. 10, T. 6 S., R. 22 E., Mount Diablo Meridian. By decision dated April 27, 1976, the California State Office rejected the application on the ground that the color-of-title claim, which was initi-ated by a deed dated October 5, 1899, arose after the land sought had been withdrawn on February 14, 1893. Cavin timely appealed from this rejection.

By decision styled Benton C. Cavin, 31 IBLA 145 (1977), the Board reversed the decision of the California State Office. While Cavin had pressed a number of discrete theories as to the initiation of his color-of- title claim, 2/ the Board's holding was primarily occasioned by the admitted

1/ It should be noted that while appellant's original color-of-title application was only under class 2, he subsequently requested that the applicability of both class 1 and class 2 be considered. See Lillian Zellmer Sharlein, A-28198 (Apr. 19, 1960).

2/ Included among these theories was appellant's oft-stated belief that he might be the owner of legal title and that documents disclosing this fact had been lost over the passage of time. Recognizing that the origins of this claim are, indeed, shrouded in some mystery, appellant has clearly been unable to establish that a Government patent was ever issued for the subject land. In fact, the allowance of the McComb homestead, discussed in the text, militates against such a theory, as its very existence is contemporaneous evidence that the land had not been patented in the 1890's. In any event, an applicant for color-of-title relief necessarily admits, for the purpose of consideration of his application, that legal title remains in the Government and, at least insofar as the adjudication of that application is concerned, is estopped from alleging that he owns legal title to the land.

existence of a homestead entry by one John McComb embracing the subject land, which had been allowed on April 17, 1894, a year after the effective date of the withdrawal. Noting that the withdrawal had expressly excepted lands "upon which any valid settlement has been made," the Board reasoned that the allowance of the homestead could only have been permitted if McComb had initiated his entry by settlement prior to February 14, 1893, the date of withdrawal. The Board, in effect relying on the presumption that Government officials properly discharge their duties, thus concluded that appellant's color-of-title claim had, in fact, arisen before the withdrawal attached upon the cancellation of the McComb entry for failure to timely submit final proof. Accordingly, the Board reversed the decision of the California State Office, and remanded the matter for further action.

By decision dated June 22, 1978, the California State Office once again rejected appellant's color-of-title application. In this decision, the State Office held that appellant's chain of title had been broken in 1942 by a conveyance from one Arthur Hill to his wife Louise Grant Hill. As a result of this break, the State Office concluded that appellant's color-of-title claim did not arise until Louise Grant Hill conveyed to Carl T. Cavin on October 3, 1942, long after the land had been withdrawn. Cavin timely sought review by this Board.

In Benton C. Cavin, 41 IBLA 268 (1979), this Board again reversed the California State Office. The Board noted that the State Office premised its conclusion that the chain of title had been broken on the terms of an amended decree of distribution of the estate of Arthur Hill which had provided, in a residuary clause, that "any other property in the State of California, not now known or discovered, which may belong to the said estate, or which said estate may have any interest in, be and the same is hereby distributed to Louise Grant Hill." The State Office reasoned that since this conveyance did not specifically describe the NE 1/4 NE 1/4 sec. 10 it was not sufficient to continue the chain of title.

In rejecting the State Office's contention, the Board pointed out that while the document which initiates the color-of-title claim must describe the land with sufficient specificity so as to identify the land with the degree of certainty essential to ascertain the boundaries and identity of the land, the subsequent conveyances in the chain of title need not repeat the exact description so long as they "provide in some legally recognized manner for conveyance of the land such that the claimant is invested with color-of-title." Id. at 271. The Board remanded the case to the State Office noting that "[i]f appellant is deemed to have satisfied all the requirements for color-of-title, patent shall issue." Id. at 273. 3/

Subsequent to this second decision, the State Office determined that appellant was entitled to some relief under the Color of Title Act. Accordingly, BLM caused an appraisal of the subject parcel to be made. The

3/ It should be noted that the decision of the State Office had also attempted to reargue its prior position that appellant's color of title, even if it was assumed the chain of title was complete, was barred because it arose when the land was withdrawn. The Board expressly rejected BLM's attempt to resuscitate this issue. Id. at 271-72.

appraisal report concluded that the fair market value of the parcel was $366,700, of which $288,700 was attributable to merchantable timber. After allowing for various deductions it was determined that the purchase price should be $183,000. This report was approved by the District Manager on January 26, 1981. By decision dated February 13, 1981, the California State Office rejected appellant's class 1 application, approved his class 2 application, directed payment of certain back taxes, and advised appellant of the required purchase price, $183,000. On March 6, 1981, Cavin filed his notice of appeal.

Consideration of this appeal was delayed, however, by a complicated series of events. Thus, on March 20, 1981, appellant sought a 5-month extension of time for filing a statement of reasons for appeal. On March 26, 1981, appellant was granted to and including September 15, 1981, in which to file a statement of reasons for appeal. On August 24, 1981, appellant requested an extension of time from September 15, 1981, to November 17, 1981. The extension was granted on that day. On November 8, 1981, appellant sought yet another extension of time based on a proposal to enter settlement discussions with BLM. By order of October 20, 1981, the time for filing appellant's statement of reasons for appeal was extended to and including May 15, 1982.

On November 20, 1981, the Chief, Division of Lands, BLM, requested that the Board remand the case file to the California State Office in order to aid in the settlement discussions. By letter of December 11, 1981, appellant filed various objections to the remand of the case file. By order dated January 18, 1982, the Board rejected appellant's objections and remanded the case file. The Board noted that "upon completion of negotiations, but in any event no later than May 15, 1982, the file is to be returned to the Board." On February 10, 1982, the Board denied a request by appellant that it reconsider its order of January 18, 1982.

On March 30, 1982, appellant sought a further extension of time for the filing of his statement of reasons for appeal, noting that a tentative schedule for resolution of the appeal had been agreed upon in the State Office. By order of May 4, 1982, appellant was granted an extension of time to and including March 15, 1983. In addition, that order modified the Board's earlier order of January 18, 1982, to provide that the case file should be returned to the Board no later than March 15, 1983.

On December 30, 1982, this Board received a memorandum from the California State Director advising it that settlement discussions had proven unsuccessful. On February 14, 1983, appellant filed a request for an additional extension of time for the filing of a statement of reasons, and also adverted to two additional notices of appeal which he had filed relating to "sub-issues." 4/ By order of February 28, 1983, the Board, noting that the case had already been pending before it for nearly 2 years, granted the

4/ Two of these sub-issues relating to a right-of-way through the land and the question of whether a new survey is necessary prior to patenting the land are dealt with, infra.

requested extension of time to June 1, 1983, but cautioned appellant that further requests for extension would be viewed with disfavor absent a showing of extraordinary circumstances. In addition, the order noted that the "sub-issues" which appellant sought to appeal were merely subsidiary questions relating to the base appeal and directed appellant to brief any of those issues which he wished to raise in his statement of reasons.

On June 1, 1983, the Board received appellant's detailed and well documented statement of reasons for appeal. On June 21, 1983, counsel for BLM requested a 60-day extension of time to file an answer. By order of June 30, 1983, the Board granted the requested extension to September 1, 1983. On August 31, 1983, counsel for BLM requested a remand of the case. The substance of the State Office's justification was as follows:

> The Bureau of Land Management (BLM) hereby respectfully requests this Board to remand this case to the Bureau in order that we may address certain omissions in the land report, appraisal, and computation of appellant's equities under the Color of Title Act * * *. Because the correctness of the State Director's decision dated February 13, 1981 depends on the validity of the conclusions contained in the above-mentioned reports, and those conclusions are now in doubt, we believe a remand to the Bureau to address our concerns at this time will provide the most expeditious means of resolving this protracted case.
>
> The Bureau also believes that, upon review and supplementation and/or modification of the above documents, there is a reasonable possibility the parties will be able to reach a satisfactory settlement and avoid the necessity for further review of the appeal by this Board.

On September 23, 1983, appellant filed written objections to the proposed remand, contending that, if granted, the remand "would be destined to delay ultimate resolution of my case -- a result which would cost me additional time, money and further burden my pursuit of life."

By order of October 28, 1983, the Board denied the request for remand, pointing out that the Board had already sent the case file to the State Office, where it was retained for almost a full year, in order to facilitate a settlement, but none had been forthcoming. The Board noted that it had been offered "no explanation as to why the deficiencies to which counsel for BLM adverts were not discovered during the case file's last sojourn to the State Office."

While the Board declined to grant the request to remand the case, the Board did afford counsel for BLM a further extension of time to file an answer to appellant's statement of reasons for appeal. Indeed, the Board expressly noted that "[i]f BLM now perceives that mistakes were made in the appraisal report it shall expressly delineate each such error, explain why it now thinks it was an error, and advise the Board as to its opinion of how correction of the error affects the ultimate result."

The Board's efforts to afford BLM a forum to rectify its mistakes came to nought. 5/ By letter of December 19, 1983, counsel for BLM advised the Board as follows:

> By Order dated October 26, 1983, the Interior Board of Land Appeals denied the Bureau of Land Management's Motion for Remand of this appeal. By motion dated December 3, 1983, appellant asked the Board to reconsider this order which granted the Bureau an extension of time until January 2, 1984 to file an answer to appellant's statement of reasons. The Bureau has elected not to file a response in this appeal and wishes to advise the Board of this fact so that your adjudication of this appeal may be expedited.

On February 2, 1984, the Board issued a show cause order to BLM. After reviewing the Board's extensive efforts to accommodate the parties, in particular, BLM, the Board majority stated:

> By declining to file a brief, BLM has placed itself in the posture of admitting that its evaluation of appellant's equities as well as its own appraisal were flawed by certain omissions, but refusing to inform this Board of exactly what those omissions were. Unless the present record is supplemented the Board will have no choice but to accept appellant's argument as to the applicable equities and order issuance of a patent to him in conformity with his request.

Pursuant thereto, the Board afforded counsel for BLM 30 days in which to show cause why patent should not issue in conformity to appellant's request. 6/

On March 8, 1984, the Board received BLM's response. Initially, counsel for BLM noted that, as she had only recently been assigned to the case, she could not answer the Board's inquiry as to why the errors had not been discovered previously. 7/ Insofar as the substance of the Board's request in its October 28, 1983, order, that the Bureau delineate each error,

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5/ In fact, appellant filed an objection to this grant of an extension of time to file an answer with the Director, Office of Hearings and Appeals. By letter of Dec. 15, 1983, the Director declined to direct reconsideration of the Board's order.

6/ This show cause order also gave rise to objections from appellant. Appellant's request that the Director direct reconsideration was denied by letter of Mar. 13, 1984.

7/ We must reject this disclaimer for two discrete reasons. First, counsel is merely representing BLM and our inquiry was directed to why BLM failed to discover the deficiencies now manifest to it. Secondly, insofar as counsel's personal knowledge is concerned, we take official notice of the fact that the attorney originally assigned to handle this appeal is still employed in the Regional Solicitor's Office in Sacramento. It would, thus, not seem to be a difficult task for counsel to inquire as to the background of the case.

explain its origins, and advise the Board as to BLM's position as to its correction, counsel stated that compliance would be impossible

> unless a supplemental land report, appraisal and equities computation were completed. Not only is the Bureau without jurisdiction to undertake such an effort while the appeal is pending before the Board, such action was deemed an imprudent expenditure of agency resources since the Board had refused the Bureau's request for remand in order to correct the deficiencies and reevaluate its decision.

We reject this rationalization of the failure of BLM to supplement the record. In the first place, counsel's assertion that BLM was without jurisdiction to undertake preparation of a supplemental land report, appraisal, and equities computation while the appeal was pending is simply erroneous. It is, of course, true that the timely filing of a notice of appeal suspends the authority of BLM to act on the subject matter of the appeal. But this has never been interpreted so broadly as to preclude BLM from preparation of supplemental reports or analyses as to the correctness of its original decision. Indeed, the case law and actual practice of BLM have been directly to the contrary.

Thus, in Owyhee Cattlemen's Association, IBLA 80-556, which involved an appeal from a decision, pursuant to an initial wilderness inventory, to conduct an intensive inventory of various units of land, the Idaho State Office proceeded while the appeal was pending to conduct the intensive inventory and subsequently sought permission of the Board, since further action by BLM was barred by the appeal, to promulgate the results of the inventory. By order of November 25, 1980, the Board suspended consideration of the initial inventory appeal and directed BLM to release its intensive inventory decision. The obvious distinction recognized in that case is between internal consideration by BLM of the matter under appeal and the taking of action on the subject matter of such an appeal. While the latter is prohibited so long as jurisdiction of the Board has been properly invoked, the former has never been interdicted by the Board's jurisdiction.

This critical distinction was expressly discussed in this Board's decision In Re Lick Gulch Timber Sale, 72 IBLA 261, 90 I.D. 189 (1983). In that case, appellants had objected to an extension of time request filed on behalf of BLM to enable it to conduct a soil survey of various tracts of land offered in a timber sale. The gravamen of appellants' complaint was such a survey should have been conducted earlier, and that it was unreasonable to allow BLM to prepare such studies after the fact. In rejecting this argument the Board noted:

> The entire purpose of the appellate system in this Department is to afford aggrieved parties a forum in which their grievances can be adjudicated at the Departmental level. The filing of a proper appeal stays the effect of the decision appealed (43 CFR 4.21(a)) until the Board determines the matter brought to it. The Board, in essence, makes the determination for the Secretary of the Interior. As his direct delegate, the Board, no less than the Secretary, himself, is required to consider all relevant information tendered both by an appellant

> and by BLM. Just as an applicant can submit studies to support its prior assertions, so, too can the Bureau submit data to support its contentions. The time frame in which the data is generated is irrelevant to appeals such as the instant one, since, until the Board acts, there is no decision for the Department. In rendering decisions for the Department the Board has the right to expect as complete a record as the parties can provide. [Emphasis supplied.]

Id. at 273 n.6, 90 I.D. at 196 n.6.

Counsel's other argument, that "such action was deemed an imprudent expenditure of agency resources" 8/ is also without merit. In effect, counsel admits that BLM's decision is not sustainable, but at the same time argues that BLM is unable to delineate exactly how these errors affect the result without conducting the very studies characterized as necessitating "an imprudent expenditure of agency resources." Thus, counsel contends that further studies are essential but that conducting them is a waste of time. Counsel cannot have it both ways.

Insofar as any specific deficiencies were concerned, counsel admitted a failure to consider timber stand improvement work, possibly faulty methodology in its timber appraisal, and an inadequate basis in the record to justify its computation of equities. Counsel was, however, unable to advise the Board as to how correction of these errors would ultimately affect appellant's application. 9/

[1] In the absence of any meaningful filing by BLM, this Board has no choice but to consider the matters involved under its de novo review authority. In this regard, however, we must note that the traditional presumption of validity which we accord to decisions of BLM state offices cannot be applied in the instant case. Since BLM has admitted its decision was inadequate, appellant has no burden of preponderating over BLM's conclusions. There is simply nothing of legal consequence to overcome.

8/ This "imprudent expenditure" argument was later expanded to include a concern over a "waste" of both BLM's and the Solicitor's office resources. Counsel ignores the fact that BLM's admitted errors have forced appellant to "waste" his resources by requiring him to prepare a massive statement of reasons to support his appeal, and that the inability of either BLM or the Solicitor's Office to ascertain the many manifest deficiencies presented in this case record (which we will explain, infra) over the 2 years this matter had been pending prior to the submission of appellant's statement of reasons has forced the Board to "waste" its resources.

9/ Counsel closed BLM's response with a contention that the Board's refusal to remand the case had necessitated "a crippled defense of the State Director's decision" because BLM's "hands are effectively tied by the Board's posture in this case." Counsel requested that the Board reconsider its denial of the remand request. We decline to do so. To the extent that counsel's defense has been shackled by BLM's failure to conduct new appraisal reports and computations, we would point out the key to open these fetters has always been in BLM's hands.

The first substantive issue which we will examine relates to appellant's qualification as a class 1 color-of-title applicant. The Color of Title Act as it presently exists has two totally separate provisions authorizing sales of land to qualified parties. The original Act of December 22, 1928, 45 Stat. 1069, authorized the Secretary of the Interior, in his or her discretion, to issue a patent for land in Federal ownership where such land had been held in good faith and in peaceful adverse possession by the applicant or his predecessors-in-interest for more than 20 years, provided that valuable improvements had been placed on the land or that some part of the land had been reduced to cultivation.

By the Act of July 28, 1953, 67 Stat. 227, Congress amended the Color of Title Act in two notable ways. 10/ First, the discretionary authority granted the Secretary under the 1928 Act to approve color-of-title applications where the land had been held for 20 years and had been improved or cultivated was changed so as to require the issuance of a patent where those conditions were met. Additionally, a new grant of discretionary authority was made to the Secretary to issue patents for land held in a good faith belief under a color or claim of title, even in the absence of improvements, where the claim or color of title commenced not later than January 1, 1901, and continued to the date of application, during which time taxes levied on the land by state and local governments had been paid. Through course of adjudicative practice and subsequent regulations, applications filed under the original color-of-title provision, as amended by the 1953 Act, have come to be referred to as class 1 claims, while those filed pursuant to the new provision added by the 1953 Act are known as class 2 claims.

Appellant seeks recognition as a class 1 claimant which would require issuance of a patent, should he be deemed qualified, and which would also negate the requirement that he tender proof that taxes were paid each year until his application was filed. See Ben S. Miller, 55 I.D. 73, 76 (1934). While it is clear from our prior decisions relating to this application that Cavin and his predecessors possessed the land in good faith for a period greatly in excess of 20 years, the State Office predicated its rejection of the class 1 application on the ground that the requirement that the land be improved had not been met, as there were no visible improvements remaining on the land. Thus, the decision 11/ stated:

> Historically, the subject lands have been used for timber production, recreation, wildlife habitat, watershed and livestock grazing. In addition to the above uses, the land once included several structures that were used by the Cavin family intermittently during summers. The applicant's father, Carl Cavin who is now deceased, ran a small mill and also made charcoal on the site; the charcoal retorts still remain on the property. Mr. Cavin's application identifies several structures

10/ It should be noted that the 1953 Act also authorized, with certain exceptions, the issuance of patents without the mineral reservation which had been required under the 1928 Act, provided that the color of title arose prior to Jan. 1, 1901. See 43 U.S.C. § 1068b (1982).

11/ The decision noted that the information upon which rejection was predicated was taken from the Land Report. This report is discussed, infra.

that were constructed on the subject land between 1944 and 1946. The field examination revealed that only four structures are standing. It is obvious from their condition that they have been abandoned for quite some time. All other structures have collapsed or were destroyed prior to the application date. (The applicant feels that two of the structures may possibly have been destroyed by the U.S.F.S.). Additional improvements on the property include two dug out springs, 500 feet of fallen-down wire fencing and several unmaintained interior dirt roads that were constructed 30 to 40 years ago.

The Land Report then refers to the Appraisal Report's discussion of the roads, which is as follows:

> Numerous roads throughout the parcel: Most of the interior roads served as logging road purposes and show a great deal of depreciation, which is defined as; a loss of utility and hence, value from any cause. Also, in effect caused by deterioration and/or obsolescence. The deterioration observed was physical due to weathering and erosion with no controls. In analysis of the sales, no quantification was evident as to interior roads within the various sales parcels. It is felt that buyers were not judging type or number of interior roads as long as it had some type of access. As such the land is appraised as vacant and unimproved. Thus, this approach provides an estimate of value which excludes an appreciation in value attributable to road improvements.

Under a heading "Forest Improvements", the Appraisal Report discusses as follows:

> In an attempt to show this appraiser the improved area, Mr. Cavin could only speculate where they had made such improvements. I was not able to discern any difference in the areas shown as improved as compared to other similar areas that were unimproved. To this appraiser, the improvement was not reasonably evident.

The Interior Board of Land Appeals has held that improvements relied upon to establish a Class 1 color-of-title claim must be present on the land at the time the application is filed and must enhance the value of the land. The cultivation claimed by Mr. Cavin was timber husbandry done in 1954. The Board also has held that the cultivation requirement has not been met where the land was not cultivated at the time the application was filed and was not cultivated for ten years previously. It is concluded that the valuable improvement placement and cultivation requirements under a Class 1 claim cannot be considered to have been met, and the application as a Class 1 is rejected. [Emphasis in original.]

[2] Thus, there were two separate predicates for the denial of appellant's class 1 application. First, BLM argued that such structures which are on the land have deteriorated to such an extent that they no longer constitute improvements of the land. Second, BLM contended that any forest improvements which appellant or his predecessors may have accomplished, actions which the State Office classified as cultivation, occurred too long ago to enable appellant to establish his class 1 entitlement. We shall discuss these conclusions seriatim.

Insofar as the value of the structures presently on the land is concerned, we note that the Department has held that for such buildings to be considered qualifying improvements they must impart some value to the land for which application has been made. See Gladys Lomax, 75 IBLA 89 (1983); Lawrence E. Willmorth, 32 IBLA 378, 381 (1977). Moreover, the Department has generally held that such improvements must be present on the land at the time the application is filed. 12/ Lena A. Warner, 11 IBLA 102 (1973); Arthur Baker, 64 I.D. 87, 91 (1957).

In his application, Cavin had alleged improvements consisting of six roads valued at $18,500, a one-room wood frame cabin, a cookhouse of two rooms, a three-room guesthouse, a tool shed, a chickenhouse, and an outhouse. With the exception of the outhouse, all buildings had been constructed between 1944 to 1946. The application noted that the chickenhouse had collapsed and that both the cookhouse and the guesthouse had been destroyed in 1970, possibly by the Forest Service.

A Land Report was prepared on December 23, 1980, based on an examination of the land stated to have occurred on August 4, 1979. With reference to the structures listed in appellant's color-of-title application, the report noted four structures were still standing, but suggested that these had been abandoned. No value was ascribed to these standing structures, owing to the author's interpretation of the Appraisal Report. Thus, the Land Report noted:

> Appraisal information indicates that the improvements found on the subject property have not increased the overall value of the parcel. Even though the improvements were probably in a little better condition at the time of application than they are now, it is likely that the land would have sold for approximately the same price whether they are present or not. The real value of the property is considered to have been in the timber, the land and to some degree in the aesthetic values on the property in general and not in the improvements; in fact, most of the improvements detracted from the overall quality of the parcel.

As appellant correctly points out, the Land Report's reliance on the Appraisal Report is misplaced insofar as the value of the structures on the

12/ It is not required that the applicant personally have placed the improvements on the land. Rather, he or she may rely on improvements initiated by predecessors in the chain of title. See Kurt J. Reif, A-27625 (Mar. 10, 1958).

ground is concerned. The Appraisal Report was filed on August 19, 1980, and approved on December 16, 1980. In his report, the appraiser expressly discounted any increased value due to interior roads or forest improvements. See Appraisal Report at 21. However, the Appraisal Report never actually held that the buildings were valueless, though at one point it referred to these structures as "somewhat questionable functional improvements" (Appraisal Report at 25). While it is true that no value was assigned to these improvements in the Appraisal Report, this was the result of the appraiser's decision to appraise the land as vacant and unimproved and thereby avoid the problem of valuating the improved property and then subtracting any enhancement in value resulting from the applicant's improvements. 13/ See also Land Report at 17.

Our independent review of the record establishes absolutely no basis for the failure in the Land Report to ascribe any value for improvements to the subject property. The pictures of the main cabin would, without more, establish the existence of improvements on the property within the meaning of the Color of Title Act, supra, as interpreted by numerous Departmental decisions. Thus, in Lillian Zellmer Sharlein, supra, clearing of brush which made a lake beach available for recreational purposes was held to be a valuable improvement. In the instant case, the Appraisal Report found that the highest and best use of the land was for timber production and rural recreational purposes (Appraisal Report at 24). That the existence of a habitable 14/ cabin on the land would enhance its value for recreational use seems so apparent it should not need to be mentioned, and would not be, save for the unexplained failure of the State Office to consider this as a qualifying improvement.

[3] In any event, appellant has clearly established that Forest Service personnel did burn down the guest cabin. Included in the exhibits to his statement of reasons for appeal is a memorandum from the Recreation and Lands Officer to the Forest Supervisor, dated August 22, 1980, in which the author admits that, sometime between 1967 and 1969, he and two other Forest Service employees burned one of appellant's cabins. See Exh. C-7. This action was justified in the memorandum on the ground that "at that time we all felt the 40 acres was Government land and all we were doing was some cleanup." 15/ The memorandum asserts that the cabin was in a run-down condition. Appellant, however, vigorously contends that this was not the case.

It is, of course, obvious that it is impossible to presently ascertain with certitude the condition of the cabin prior to its destruction by the Forest Service. It is interesting, however, to note that in a letter from

13/ The methodology employed by the Appraisal Report is examined in detail, infra.
14/ That the cabin is presently habitable is established beyond peradventure by numerous affidavits submitted by appellant with his statement of reasons for appeal. See, e.g., Exhs. B-10, B-23, B-26.
15/ This rationalization of good faith, however, is undermined by the fact that when the Forest Service had been approached by Deputy J. K. West of the Madera County Sheriff's Office as to whether it had authorized destruction of the cabin, the Forest Service denied any knowledge of the matter. See Exh. H-4.

the Chief, Division of Lands, Forest Service, to the Forest Supervisor, dated January 23, 1969, prior to the destruction of the cabin, the Chief stated that "we appreciate your desire to have the improvements removed and agree that if this cannot be done by persuasion within a reasonable period, legal action will be necessary." See Exh. C-24. At least, at that time, Forest Service personnel considered the structures to be improvements.

With the Forest Service having destroyed one of appellant's cabins, 16/ the Government is hardly in a good position to argue that the cabin cannot properly be considered as fulfilling the improvement requirement of the Color of Title Act. In United States v. Copple, 81 IBLA 109 (1984), we noted, with reference to a Government lease of an unpatented mining claim, that, where the conditions of a shaft had deteriorated during the period of the lease due to Governmental neglect, the Government must restore the caved shaft to its prior condition or be forestalled from challenging an assertion of discovery at depth. This principle has even greater force where the destruction involved arises not from mere neglect, but from affirmative action. In Bobby Carlton, 74 I.D. 214 (1967), the Department held that where all of the necessary improvements to establish entitlement to a class 1 color-of-title claim have been placed on part of a tract of land, and that part is subsequently taken by the United States and flooded, on the mistaken assumption that the tract is private land, an applicant's right to the class 1 claim is not thereby vitiated as to other parts of the tract sought, even though none of the remaining parts contain improvements. Application of these salutary principles leads ineluctably to the conclusion that rejection of appellant's class 1 claim was totally without merit, for this reason alone. 17/

Inasmuch as we have decided that appellant is properly accorded class 1 status, it is unnecessary to discuss whether the roads he has constructed and the water sources which he has allegedly developed would themselves be sufficient to constitute improvements within the purview of the statute. While this is equally true of the timber improvements which appellant has alleged he caused to be made, the Board must, nevertheless, examine this allegation since it has a direct bearing not only on appellant's entitlement to class 1 consideration, but also on the correctness of the appraisal.

[4] Initially, we note that the State Office discounted any forest improvements on the grounds that such cultivation as may have occurred was accomplished in 1954, and that this Board had held that the cultivation requirement has not been met where the land was not cultivated at the time of the application and was not cultivated for 10 years previously. With reference to cultivation, the Board has, indeed, so held. See Lester Stephens, 58 IBLA 14 (1981); Mabel M. Farlow (On Reconsideration), 39 IBLA 15, 86 I.D.

16/ While we do not decide the issue, appellant has submitted additional information implicating Forest Service personnel in the destruction of the cookhouse, as well.

17/ Having determined that appellant has qualified as a class 1 applicant, it must follow that the State Office's demand that he submit proof of payment of back taxes must also be reversed as there is no requirement that a class 1 claimant submit proof of payment of back taxes. See, e.g., Ben S. Miller, supra.

22 (1979). Indeed, in Bernard R. Snyder, 70 IBLA 207 (1983), the Board held that failure to cultivate the land for 5 years prior to filing of an application did not meet the cultivation requirements.

While the State Office decision correctly stated prior legal holdings of the Board, its error was to assume that silviculture activities by an applicant are necessarily considered cultivation rather than the placing of improvements on the parcel. This is not the case.

In this regard, we would note that the applicable definition of "cultivation" in both the Homestead and Desert Land Entry Acts would not encompass the growing of coniferous trees. See 43 U.S.C. §§ 161, 321 (1982). As the concurring opinion in William S. Archibald, 75 IBLA 236 (1983), noted, the Department had consistently held that cultivation is "ordinarily understood to mean [the growing of] wheat, corn, potatoes, or other annual crops which are cultivated and harvested during a single growing season." Id. at 240, citing Lauren M. Lucas, Oregon 09887 (Dec. 7, 1960). Accordingly, while the planting of fruit trees has been held to constitute cultivation within the meaning of the homestead and desert land laws since the fruit which they bore was annually harvested, attempts to acquire entries based on the cultivation of coniferous trees have been rejected. See William S. Archibald, supra.

Moreover, it should be recognized that the Department's decision in Ben S. Miller, supra, dealt with "clearing of underbrush, dead trees, the trimming and thinning of trees" in the context of improvements of the land, not cultivation. Id. at 76. In the light of these considerations, we conclude that past actions of a color-of-title applicant relating to silviculture practices may well establish that an applicant has placed improvements on the land as required for a class 1 claimant. 18/

Insofar as the nature of his silviculture work is concerned, appellant takes strong exception to the conclusion of the Appraisal Report that the appraiser was "not able to discern any difference in the areas shown as improved as compared to other similar areas that were unimproved" (Appraisal Report at 21). Appellant points out that while it is presently impossible to discern any difference between the areas planted in 1954 and other areas in his claim, a fact he attributes to the success of his and his father's work, it is nevertheless quite easy to see the significant pruning and thinning activities which have been ongoing for years. To support this contention, he has submitted a report by C. Sikora and Associates, written by Charles Sikora, a professional forester. In this report, Sikora notes that "there is evidence of Timber Stand Improvement work to be found on most of the property" (Exh. G, "Timber Land Appraisal," at 2). Subsequently, he wrote:

> There was significant investment in Timber Stand Improvement (TSI). This investment consisted of pruning, thinning, and plan- ting. These are labor-intensive projects. While the plantations are not readily apparent, the other work is. Much of this work was done in the 1950s. Pruning costs were about $1.50 per tree in the late 50s. While no count of pruned trees was made,

18/ In light of our conclusion, we need not determine if, and under what circumstances, silviculture activities might be deemed to be cultivation under the Color of Title Act.

> I estimate that the number of trees pruned exceeds 2000. Thus, pruning costs were at least $3,000.
>
> Thinning costs at this time would have been about $100 per acre. There were some 20 acres thinned; therefore, it is reasonable to assume thinning costs were $2,000.
>
> Planting costs were about $200 per acre in normal sites. However, planting here was in small scattered locations, and thus were more expensive. An estimate of $1,000 for planting costs is reasonable.
>
> The total TSI investment may be conservatively estimated to be $6,000.

Id. at 4-4b.

As we have noted above, this conclusion stands effectively unrebutted in the record. Realization that appellant and his predecessors in interest did, in fact, contribute to the increase in timber values, however, also fatally undermines the valuations and computations in the Appraisal Report, because, as we shall explain, it necessarily undermines the subsisting premise of the appraisal.

In order to obviate the need for subtracting the value of improvements from the overall appraisal of the land, the appraiser treated the land as vacant and unimproved (Appraisal Report at 21). Appellant suggests that this approach was contrary to the applicable regulation, 43 CFR 2541.4(a). That regulation provides, inter alia, that:

> The land applied for will be appraised on the basis of its fair market value at the time of appraisal. However, in determination of the price payable by the applicant, value resulting from improvements or development by the applicant or his predecessors in interest will be deducted from the appraised price, and consideration will be given to the equities of the applicant.

Appellant argues that this regulation requires that the land be appraised as it exists and such values as are provided by an applicant's improvements are then to be subtracted from the total. While we agree that appellant's approach is certainly permissible under the regulations, we cannot agree that the approach utilized by the appraiser is necessarily prohibited. On the contrary, it is easy to conceive of a number of situations in which either approach will lead to the same result. The problem which appellant perceives finds its genesis not so much in the methodology employed by BLM 19/ as in

19/ Our approval of the methodology employed goes only to the question of whether, in proper circumstances, a tract may be evaluated as vacant and unimproved as a mechanism by which BLM may subtract the value of improvements on the land from its present, improved value. Other aspects of the appraisal, in particular, the violation of the "unit rule" in making the appraisal, clearly do not follow the Uniform Appraisal Standards adopted by the Interagency Land Acquisition Conference. These deficiencies are discussed subsequently in the text.

its failure to give proper consideration to the timber stand improvements which appellant and his predecessors caused to be made. Effectively, the appraiser deemed the timbered land to be vacant and unimproved when, in fact, the timber, itself, represented part of the improvement. Accordingly, no adjustment was made to the appraisal for enhancement of value of the timber, itself, though one clearly should have been made.

It is difficult to quantify the effects of this omission, though they doubtless would be far-reaching. The value of the improvements which should have been deducted are not limited to the actual out-of-pocket expenditures of appellant but include the value of the timber as enhanced by appellant's activities. 20/ Since, as we have noted, BLM erroneously failed to consider the existence of such improvements, and, therefore, no adjustment in value was made for this element, BLM's evaluation is necessarily in error.

[5] Nor was this the only deficiency in the instant appraisal. The Appraisal Report which BLM prepared actually consists of two separate appraisals: a land appraisal and a timber appraisal. Appellant correctly argues that this bifurcated approach constituted a violation of the "unit rule" expressly adverted to in the Uniform Appraisal Standards (UAS), developed by the Interagency Land Acquisition Conference in 1973. In discussing this rule, the UAS noted that "different elements of a tract of land are not to be separately valued and added together." Id. at 27. As an example, the UAS stated that "the value of timber is not added to a value for the house and those, in turn, added to a value for the remainder of the property." Rather, the UAS cautions "the property is to be valued as a whole and its constituent parts considered only in the light of how they enhance or diminish the value of the whole, with care being exercised to avoid so-called 'cumulative' appraisals." Id. at 27-28, citing, inter alia, Morton Butler Timber Co. v. United States, 91 F.2d 884 (6th Cir. 1937). The instant appraisal did precisely what the UAS warned against. It separately appraised the land and the timber and then aggregated the sums derived from each appraisal. No justification for this deviation was offered in the record.

This failure to follow the UAS is especially egregious since the appraiser was aware of the reason why cumulative appraisals are prohibited. In his discussion of the comparable market value, the appraiser noted that "[u]sually, land and timber sales as a unit reflect somewhat lesser land values than sales of land where timber is reserved, or after sales, when logging is complete" (Appraisal Report at 45-46). Yet, despite this recognition, no adjustment was made to reflect the fact that cumulative appraisals tend to overvalue the entire estate being appraised.

With respect to the specific appraisals, appellant correctly points out that the timber was appraised under the analytical approach 21/ despite the

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20/ Thus, were we faced with the question of valuing land under cultivation, all value of the crop, itself, must be discounted, and BLM could not properly limit deductions to the monetary value of an applicant's expenditure of time and capital.

21/ In an analytical appraisal, the appraiser determines the value of the end product and subtracts these from the costs associated with manufac-turing, logging, transportation, and a figure representing profit and risk.

fact that the BLM Manual provides that the market value approach is the preferred system for appraising the value of nonadvertized sales. See BLM Manual 9351.21. This variance from standard procedure was also not explained.

Appellant also disputes the net volume computation factors utilized by BLM. Thus, BLM estimated that 96 percent of the sugar pine, 94 percent of the yellow pine, 94 percent of the white fir and 87 percent of the Incense cedar were recoverable. Appellant notes that the yield factors utilized by Sikora were 86.4 percent, 90.5 percent, 77.8 percent, and 53.2 percent, respectively, and appellant has provided the Board with a third set of figures which he has derived from recent sales by the Forest Service, and which are also significantly lower than the figures employed in the timber appraisal. In light of these, and other, 22/ unexplained discrepancies and errors, including a statement by the Forest Service's Lands Officer questioning BLM's methodology and concluding that it was "pure coincidence that the values shown by your analysis agree with our local expectations," we agree that the appraisals submitted by BLM must be disregarded.

Appellant has suggested that the land is properly appraised at $100,000. Appellant derives this figure by averaging the valuation of the Sikora Report ($104,150), an estimate by Janet Wheeler, a local real estate broker ($100,000), and the estimate by the Forest Supervisor contained in a memorandum from the Forest Supervisor to the Regional Supervisor, dated April 15, 1982 (Exh. C-3), which placed a value of $97,170 on the property. 23/ While we agree that, considering the state of the present record, this is the optimal approach, we feel that certain adjustments must be made before an average is properly ascertained.

In particular, analysis of the Sikora Report shows that certain improper elements were introduced as deductions to fair market value. Thus, Sikora deducted 10 percent of the price actually paid for his comparables as selling costs, attributing these to real estate commissions, title reports, etc. While it may be true that such selling costs must be subtracted in order to determine the net amount of money received by a seller, they have no bearing on the value tendered by a buyer. Market value is the price that a willing buyer will pay and a willing seller will accept. Adjusting the figure on which the seller and buyer actually conclude the sale for costs absorbed by the seller may give a truer figure of the return to the seller but it distorts the real market value of the transaction.

Similarly, Sikora discounted the sales price owing to an assumption that the seller took back a note for 75 percent of the selling price. Sikora, however, had no factual basis for this assumption. See Sikora Report at 7. It is obvious that no discount for the present cash value of the note would be proper if a bank or other lending institution had financed the transaction,

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22/ Included in this category is double counting of residual timber and the assumption that clear-cutting would be the method of removal without any indication that such harvesting methods comported with either prudent forest management or legal restrictions imposed by the State of California. 23/ This marked diminution in the estimate of fair market value was solely occasioned by the dramatic decline in timber values between the date of BLM's appraisal and the date of the Forest Service's estimate.

and, in the absence of any evidence that the comparable sales were seller-financed, it was error to make such an adjustment. When these discounts are disallowed, the average of the three Sikora comparables for land values is $64,900, rather than $47,000 as concluded by the report. 24/

Another inappropriate adjustment was made in the evaluation of timber where $10,750 was deducted for costs of sale preparation and adjustment. Once again, Sikora focused on net return to the seller rather than market price. Indeed, we would point out that BLM has been forced to complete many of the same studies which would be necessary in order to sell the timber, some of the very costs which Sikora, in effect, discounts. Correct computation of the market values derived by Sikora leads to a timber value of $67,750, placing the total value of the parcel at $132,650. We will then adjust this figure to $125,000 to reflect increased value due to the cumulative nature of the appraisal. When the properly adjusted Sikora figures are averaged with the other two estimates, the result is $107,390. We hereby adopt this figure as the fair market value of the land sought by appellant, unadjusted for enhancement of value. It is next necessary to determine how much of this value is attributable to appellant's improvements.

[6] Appellant argues that the value of his improvements should be valued at $40,000 for existing improvements and $13,000 for the two cabins which were destroyed. Appellant arrived at his value estimates by counting the amount of money expended, adjusting for inflation. This is not the proper approach.

The amount of adjustment properly made to discount improvements placed on the land is not dependent upon an applicant's expenditures. Rather, the present fair market value is to be adjusted downward to reflect the enhanced value of the land caused by the improvements. As an example, an individual could place improvements costing $25,000 on property valued at $100,000 prior to such construction. If the property is then valued at $115,000, it is obvious that the property has been enhanced only $15,000. It is the $15,000, representing the enhancement in value, for which a deduction is allowed, rather than the $25,000 which merely shows out-of-pocket expenditures. While our de novo review of the record convinces us it was clear error for the State Office to assign no valuation for improvements, even given its approach of assuming that the land was vacant and unimproved for purposes of appraising comparable sales, we do not believe an adjustment of roughly 50 percent, as appellant suggests, can be supported by the record.

In the exercise of our de novo review authority, which includes the right to determine for ourselves any factual or legal question necessary to adjudicate an appeal, we hold that appellant is properly allowed a 20-percent adjustment for enhanced timber value, aggregating $13,000, and a 10-percent adjustment for enhancement of access and improvement of the property values by construction of the various buildings on the land, in the amount of $6,500. Thus, we determine that the proper valuation of the subject property, giving due consideration to enhanced value occasioned by appellant's activities, is

24/ We are constrained to point out that Sikora also evaluated the timber as separate from the land, thus violating the "unit rule" in the exact fashion that BLM's appraisal erred.

$87,890. Having established the fair market value relevant to this color-of-title application, we turn now to the question of the equities allowable to appellant.

[7] While the Department has long recognized that due consideration must be afforded to a color-of-title applicant's equities, no specific approach has ever been mandated on a Departmental-wide basis. This Board has, however, delineated the elements which must be considered in determining such equities. Thus, in Ralph Dickinson, 39 IBLA 258 (1979), the Board noted that BLM properly considered the amount paid for the land and the length of time which an applicant had possessed it. In addition, however, the Board noted that other factors should also be considered, including

> whether the applicant and his grantors paid fair market value for the land, the degree of reasonableness of the applicant's belief good title to the land was acquired, the length of the chain of title, how the errors relied upon by the applicant were caused, the payment of taxes on the land, and any other factors which in a spirit of fairness, a court of equity would recognize.

Id. at 261-62. (Footnote omitted.)

In the instant case, BLM afforded appellant a roughly 50-percent equity adjustment. But, as counsel for BLM admits, while the Land Report listed various considerations of an equitable nature, 25/ no apportionment was made among individual elements and, in fact, because of the nature of the Land Report, it is uncertain whether all of the elements actually listed were found to weigh favorably on appellant's side. See Land Report at 18. In short, though the record establishes that some consideration was given to appellant's equities, it is impossible to ascertain how any specific equity contributed to BLM's determination. We agree with counsel for BLM that "the computation appears arbitrary and capricious."

Appellant, for his part, raises a variety of differing arguments relating to his equities. A number of those are clearly without merit and will not be discussed in detail. 26/ We do wish, however, to directly address appellant's contention that any appreciation of value in the land since 1942 must be counted as an equity on appellant's side. This is simply not the case.

25/ Moreover, while specific allowance was made for taxes paid between 1963 and 1969, no consideration was given to taxes paid prior to 1963.

26/ Thus, appellant again resuscitated his claim that he possesses legal title to the land. As we have noted above, however, an applicant for a patent under the Color of Title Act is forestalled from challenging United States ownership of the land for purposes of adjudicating his claim. See note 2, supra. Additionally, appellant attempted to argue that he has legal title because of adverse possession of the land. The short answer to this contention is that principles of adverse possession do not apply against the United States. Indeed, if such were the case, there would have been no need to adopt the Color of Title Act.

Even assuming that the $300 which appellant paid in 1942 was fair market value, the mere fact that a color-of-title applicant paid fair market value to someone else cannot serve to vest in the applicant the right to discount all subsequent increases in market price when seeking to purchase the land from the United States. This clearly was not the intent of Congress, since such an approach would almost inevitably result in issuance of a patent for the statutory minimum. 27/ Had this been Congressional intent, Congress would simply have provided that all patents issue for $1.25 per acre. Indeed, Congress so directed in a number of specific enactments. See Act of June 8, 1926, 44 Stat. 709, 43 U.S.C. § 177 (1982); Act of February 23, 1932, 47 Stat. 53, 43 U.S.C. § 178 (1982); Act of August 24, 1954, 69 Stat. 789. In adopting the general Color of Title Act, however, Congress chose not to so provide.

Similarly, appellant's theory that he became vested with full equitable title upon the passage of the Act of July 23, 1953, supra, such that no appreciation in value since that date can be considered, proceeds from an equally flawed legal premise. Contrary to appellant's assertion, no vested rights were acquired by an occupant of Federal land under color-of-title merely by the passage of the Act. Such rights as were granted were capable of vesting only upon application by a qualified claimant.

This can be seen from the following example. If an individual had improved the land held under color of title for more than 20 years, upon notification that the land was Federally owned, he had an inchoate right to apply for a patent under the Color of Title Act. If the individual applied under the Act, his inchoate right would vest, such that a subsequent purchaser could succeed to his right to have the application processed. If, however, rather than apply under the Act, the putative applicant sold the property to another, the new purchaser would be required to hold the claim under good faith for 20 years before becoming eligible for relief, since his predecessor's acquisition of knowledge of Federal ownership broke the chain of good faith possession. 28/ See Prentiss E. Furlow, 70 I.D. 500 (1963). Until the filing of an application, an applicant had no vested right which he could transfer.

Finally, even though we agree that equitable title did vest in appellant in 1976, upon the filing of his color-of-title application, this does not mean that he became vested with an equitable right to all appreciation in value occurring after that date. In A. F. Dantzler, A-31038 (May 12, 1970), the Assistant Secretary rejected an argument that the land should be appraised as of the date of the application by adverting to section 2 of the

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27/ Indeed, the only theoretical situation in which such would not be the result would be in circumstances where the applicant had not tendered fair market value. Such below-market transactions, however, often give rise to the question of the bona fides of the seller and may well serve to break a chain of title. See, e.g., Lawrence E. Willmorth, 64 IBLA 159 (1982).

28/ In this regard, good faith occupants of Federal land under color of title are akin to Native occupants whose use and occupancy of Federal land, consistent with the Native Allotment Act, gave rise to an inchoate preference right to an allotment. This right, however, would only vest upon the filing of an application under the Native Allotment Act. See United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

Act, 43 U.S.C. § 1068a (1982), which expressly provides that the appraisal shall be "on the basis of the value of such lands at the date of appraisal." Appellant's contention herein is merely a variant of the argument rejected in Dantzler.

Appellant contends, in effect, that Congress intended that the Department appraise the land as of the date of appraisal, and then adjust that value downward for any increase in value occurring subsequent to the filing of the application. But, if Congress had intended all appreciation in value from the date of application to be considered an element of an applicant's equity, Congress certainly would merely have directed that the appraisal be based on the value of the land at the time of application. This, Congress did not do, and appellant's attempt to reach the same result rejected in Dantzler through a considerably more convoluted process must be rejected.

Appellant also places great reliance on procedures utilized by other BLM state offices as indicating that he should be allowed to purchase the land at the statutory minimum. As we noted earlier, while this Board has in the past delineated the considerations relevant in determining the equities of a color-of-title applicant, we have never mandated a specific formula for their computation. We do not intend to do so now. However, in order for us to complete adjudication of the instant appeal it will be necessary to utilize a specific approach. While we do not intend to preclude other formulas developed by the various state offices, we would expect that any variants achieve compatible results.

Appellant has submitted a memorandum outlining the procedures followed by the Eastern States Office (ESO). In our view, its approach, with one modification, provides a useful and workable framework for the difficult task of assigning specific values to the various factors which contribute to an applicant's equity.

Shortly stated, the ESO uses six separate categories, each with a maximum assigned value of 16.7 percent, to quantify the equities involved in any specific case. These six are: (1) Longevity of an applicant's claim; (2) whether the applicant and his or her grantors paid the fair market value for the land; (3) the degree of reasonableness of an applicant's belief that he had acquired good title; (4) the length of time of the chain of title; (5) how the errors relied upon to initiate the chain of title arise; and (6) the payment of back taxes on the land. Beyond this, ESO procedures also provide for an additional deduction occasioned by other factors which would be considered by a court of equity.

Our one modification relates to the computation basis utilized for factors 1 (longevity of a claim) and 4 (length of the chain of title). In computing assigned values for longevity of the applicant's claim, ESO granted 100 percent of the 16.7 percent allocated to this category in any situation in which the claimant had occupied the land in excess of 40 years, prior to application. While we do not quarrel with the assumption that 40 years or more gives rise to a full deduction for this equity, we believe that the proper date for computational purposes is not the date of application, but rather the date an applicant was informed of the claim of the United States to the land, for on such date as an applicant knows or should know that legal title to the land remains in the United States, holding in good faith ceases.

During the period between acquisition of knowledge and the filing of an application continued occupancy should not serve to increase an applicant's equity. 29/ A similar modification must be made for category 4, where a full 16.7 percent is awarded for a 100-year chain of title, and a proportional percentage deduction for any lesser amount of time.

Therefore, three dates are relevant for equitable computation purposes: (1) 1899, when the color of title arose; (2) 1942, when appellant's father purchased the claim; and (3) 1963, when appellant was informed of the Federal claim of ownership. Considering the particular facts of this case, we have determined that appellant is properly awarded the following equity factors:

Longevity of title (40 years = 16.7 percent)	8.77 percent	
Payment of fair market value		16.70 percent
Reasonableness of good faith		16.70 percent
Length of the chain of title (100 years = 16.7 percent)	10.69 percent	
How errors arose		16.70 percent
Payment of back taxes (100 years = 16.7 percent)	11.69 percent	
		81.25 percent

In addition, we have determined that an additional 10 percent should be awarded because of appellant's considerable efforts to show entitlement, necessitated by three different adverse decisions by the State Office, all of which were substantially reversed on appeal to this Board. We believe that a court of equity would properly make such an adjustment. Other factors raised by appellant relating to additional perceived equities, such as payment of mortgages which he had placed on the property, we find not to be meritorious. Accordingly, we hereby conclude that consideration of appellant's equities, as mandated by the Act, requires a reduction of 91.25 percent of the appraised value of $87,890. From the resulting figure of $7,690, we will subtract the amount appellant's father paid for the tract, $300. We hereby order that patent issue to appellant for the land sought in his application upon payment of the sum of $7,390.

[8] We turn now to two of the sub-issues which appellant has raised in connection with this appeal. The first involves the May 13, 1980, grant of a right-of-way to the Forest Service for a road, designated 6S-10, across the subject property. In the decision under appeal, appellant was informed that his patent would be subject to an express reservation for this right-of-way.

In his appeal, appellant states that while he does not object to an easement for the road, 30/ he does object to the breadth of the proposed reservation. He informs this Board that both the Forest Service and BLM have agreed to delete the express reservation and instead execute an easement agreement covering the land. Appellant has provided the Board with a copy

29/ In fact, computation of equity to the date of application rather than acquisition of knowledge of Federal ownership would have the anomalous result of increasing equities for those who fail to file while punishing those who take immediate steps to regularize their occupancy.

30/ Appellant has admitted that an easement for the predecessor of this road was granted by his father to the Forest Service in approximately 1950. See Statement of Reasons, C-17.

of his proposal as exhibit N-5. He requests that this Board order the preparation of a metes and bounds description delineating the exact right-of-way easement.

This Board will direct deletion of the proposed reservation for the right-of-way for the simple reason that BLM was without authority to grant such a reservation after the filing of appellant's color-of-title application, which, inasmuch as we have determined it was properly deemed to be a class 1 claim, gave rise to a vested right in appellant to purchase the land without any additional encumbrances, save those mandated by law. This being done, however, the desire of appellant and the Forest Service to enter into an easement agreement (as well as the extent to which the prior grant of an easement by appellant's father may still be efficacious pursuant to the doctrine of after-acquired title) is a matter of no concern to BLM, as it has no interest in any easement which may be acquired by the Forest Service. Thus, the preparation of a metes and bounds description for any such negotiated easement is a matter solely between appellant and the Forest Service and beyond the purview of this Board.

[9] The second sub-issue relates to appellant's request that this Board order a resurvey of the land within his claim. Appellant contends that a resurvey by the Forest Service in 1980 moved the southwest corner of his claim, thereby reducing the size of his claim by 2 acres. Cavin suggests that a 1940 joint survey conducted by the Forest Service and Blister Rust Control personnel should control.

In this regard, we are constrained to point out to the parties 31/ that neither the 1940 nor 1980 surveys constitute official surveys of the United States. The power to officially survey public lands is vested solely in the Secretary of the Interior. See 43 U.S.C. §§ 2, 752 (1982). So, too, is the authority to conduct resurveys. See 43 U.S.C. § 772 (1982). This power extends over lands within the national forests under the administration of the Forest Service. See Sweeten v. United States Department of Agriculture, 684 F.2d 679, 680 n.1 (10th Cir. 1982). As a result, survey lines extended by the Forest Service upon lands under its jurisdiction do not constitute official surveys of the United States. Arthur E. Meinhart, 6 IBLA 39 (1972).

The 1940 and 1980 surveys referenced in the record are, thus, not official surveys but are rather what are generally termed administrative surveys, useful for administrative purposes of the surface management agency but not controlling as to legal boundaries of land. As we noted in Mr. & Mrs. John Koopmans, 70 IBLA 75 (1983), administrative surveys "are not based on necessary statutory authority to establish or reestablish the boundaries of Federal

31/ We note that in a letter directed to appellant, dated Jan. 6, 1983, the Chief, Division of Operations, stated that "this office believes the 1980 Record of Survey adequately describes section 10 and we feel an additional survey is unwarranted" (Exh. D-1). This letter also referred to the 1980 survey as properly executing the subdivision of the section. As we make clear in the text, the 1980 survey, as a matter of law, could not possibly constitute an official subdivision of the section as the Department of Agriculture has no authority to conduct official cadastral surveys.

lands." Id. at 76. As a result, they cannot "establish or reestablish any legal corner monuments." Id. at 88. In light of these settled principles, and in the absence of any indication in the record that the 1980 survey was an official BLM cadastral survey, we are unable to understand the statement by the Chief, Division of Operations, that the "subdivision of the section was properly executed" by the 1980 survey. See Exh. D-1. Moreover, since the Forest Service survey did not purport to recover either the N 1/4 corner or E 1/4 corner of sec. 10, but rather reestablished these two corners (Exh. A-3), it becomes difficult to comprehend how it is possible to conclude whether the Forest Service map correctly depicts the land embraced by appellant's claim. We must point out, however, that the 1940 administrative survey is equally nonconclusive as to the boundaries of appellant's claim since it, too, was merely an administrative survey.

Certain principles, however, should be kept in mind. A color-of-title claimant is necessarily limited to the land described in the documents on which his color or title is based, regardless of what land he actually occupies, since his rights are based only on occupancy under color of title. Thus, if, in point of fact, the NE 1/4 NE 1/4 of sec. 10, as established by the 1874 survey (which is apparently the only official survey of record), constitutes less land or different land from that which appellant believes to be within his claim, appellant's rights under the Color of Title Act are necessarily limited to the land actually described. The fact that appellant or his predecessors may have been misled by the posting of the Forest Service's signs signifying that the boundaries of his claim were in a specified location, which location may not ultimately accord with the actual boundaries of the NE 1/4 NE 1/4, gains him no right to land in excess of or different from the land actually described in the original conveyance on which his color of title is based. See generally United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978); cert. denied 442 U.S. 917 (1979). Thus, regardless of the limits of the land which appellant may have occupied, his claim can embrace only such land as constitutes the NE 1/4 NE 1/4, established pursuant to the 1874 survey.

Thus, by definition, a patent of land describing the NE 1/4 NE 1/4 will embrace all of the land to which appellant is entitled. We recognize that there may be subsidiary disputes as to the locus of the lands so patented. This possibility, however, is not properly raised in the context of a color-of-title application. Should a conflict between the Forest Service and appellant arise after patenting, other mechanisms are available for its resolution including the possibility of a quiet title suit in Federal court. We will not anticipate this contingency here by ordering a resurvey of the land embraced by appellant's claim of title.

In summary, upon the payment of $7,390 to the California State Office, appellant shall be granted a patent to the NE 1/4 NE 1/4 sec. 10, T. 6 S., R. 22 E., Mount Diablo Meridian. Such patent shall not contain a reservation for the road designated as 6S-10.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of BLM is

reversed as to appellant's class 1 qualifications, reversed as to the requirement that appellant tender proof of payment of taxes, reversed as to the purchase price assessment of $183,000, and remanded with instructions for further action.

James L. Burski
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge